

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LORENZO LARESE SANDERS,

Defendant-Appellant.

UNPUBLISHED

January 12, 2006

No. 257401

Wayne Circuit Court

LC No. 04-002078-01

Before: Murray, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to eighteen years and nine months to thirty years in prison for the assault with intent to murder conviction, three to five years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm.

On appeal, defendant first argues that he is entitled to resentencing on his assault with intent to murder conviction¹ because the trial court erroneously scored one point for OV 12 and ten points for OV 14 under the sentencing guidelines. Defendant asserts that, had OV 12 and OV 14 been correctly scored at zero, the minimum sentence range would have been 126 to 210 months instead of 135 to 225 months, and thus, defendant's 225-month minimum sentence falls outside the guidelines recommended minimum sentence range as correctly scored. We disagree. Defendant did not object to the trial court's scoring of OV 12 at one point and OV 14 at ten points; therefore, we review his challenge to the scoring of those variables for plain error. *People v Kimble*, 470 Mich 305, 309-311; 684 NW2d 669 (2004); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); see also MCL 769.34(10). We conclude that there is no plain error in the scoring of these variables.

The statutory sentencing guidelines set forth at MCL 777.1 *et seq.*, apply to the present case, as the offenses occurred after January 1, 1999. MCL 769.34(2); *People v Hegwood*, 465

¹ Defendant does not challenge his sentences for his other convictions.

Mich 432, 438-439; 636 NW2d 127 (2001). Under the sentencing guidelines act, a court must impose a sentence in accord with the appropriate sentence range. MCL 769.34(2); *Hegwood, supra* at 439. The sentencing court has discretion in determining the number of points scored provided there is evidence on the record that adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). If the minimum sentence imposed is within the guidelines range, this Court must affirm and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied on in determining the defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). An error in scoring the sentencing guidelines that does not affect the total OV score enough to change the applicable sentencing guidelines' range is harmless. *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004).

We agree with defendant that OV 12 was improperly scored. Defendant was assessed one point for OV 12, contemporaneous criminal acts, indicating that there was one contemporaneous felonious criminal act involving any other crime. MCL 777.42(1)(f). Because there was no objection to the scoring, the record does not indicate the basis for this scoring decision. However, MCL 777.42(2)(a) provides that an act is contemporaneous if it occurred "within 24 hours of the sentencing offense" and "will not result in a separate conviction." Defendant's felonious criminal acts in the instant case - being a felon in possession of a firearm and felony-firearm - were not contemporaneous under this definition because they resulted in separate convictions. Moreover, MCL 777.42(2)(b) expressly exempts a felony-firearm violation from consideration in scoring OV 12. Accordingly, we conclude that the trial court erred in scoring one point for OV 12. However, even with the correction of defendant's OV 12 score to zero, the deduction of one point from the total OV score does not impact the overall OV level. Because the correct scoring of OV 12 would not change defendant's OV level or recommended minimum sentence range, any errors are harmless. *Houston, supra* at 472-473.

We reject defendant's argument that the trial court erred in scoring OV 14 at ten points. Pursuant to MCL 777.44, the sentencing court must score ten points if "the offender was a leader in a multiple offender situation," and zero points if "the offender was not a leader in a multiple offender situation." The statute further instructs that "the entire criminal transaction should be considered when scoring this variable." MCL 777.44(2)(a). Considering the entire criminal transaction, we find that the trial court's score of OV 14 at ten points was adequately supported by the evidence. *Hornsby, supra* at p 468.

Here, there was testimony that the victim, Kenneth Jackson, had some "run-ins" with defendant's family approximately eleven or twelve years ago, and he had not seen defendant since then until a couple of days before the incident. Before the incident, the victim was driven to the unfamiliar area by defendant and Chauncey Jackson. The victim fell asleep in the front passenger seat of the car, and, when he woke up, Jackson was gone and defendant was standing outside, directing him to exit the vehicle. When defendant got out of the vehicle and put on his jacket, defendant shot the victim in the back and fired four or more shots. As the victim was struggling with defendant and trying to run away for his life, he heard two voices, possibly over a cell phone, and one of the voices was saying, "did you get him[?]" After the incident, the victim told the officers that defendant and Jackson shot him.

The above evidence sufficiently supports the sentencing court's determination that defendant was the leader in a multiple offender situation, as it could be inferred that defendant,

whose family had previous “run-ins” with the victim and who had the conversation with others at the time of the shooting, acted with others. The trial court, thus, did not err in scoring ten points for OV 14. *People v Hack*, 219 Mich App 299, 313-314; 556 NW2d 187 (1996); *People v Johnson*, 202 Mich App 281, 289-290; 508 NW2d 509 (1993). Because the trial court’s scoring of OV 12 and OV 14 does not affect defendant’s sentencing guidelines range of 135 to 225 months, it does not constitute a plain error that affected defendants’ substantial rights. *Carines*, *supra*, pp 763-764; see also MCL 769.34(10); *Kimble*, *supra*, pp 309-311. As such, we hold that defendant is not entitled to resentencing.

Defendant further argues that the trial court relied on facts not found by the jury in violation of *Blakely v Washington*, 542 US 2531; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. Because defendant did not raise a constitutional challenge to Michigan’s scoring system at trial, we review this unpreserved constitutional error de novo under the plain error standard. *Carines*, *supra*, pp 763-764.

The Michigan Supreme Court has specifically held that *Blakely*, which reviewed the state of Washington’s determinate sentencing scheme, does not affect Michigan’s indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Defendant maintains that *Claypool* is mere dicta and not binding on this Court. In *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), the defendant raised the exact same argument, regarding *Blakely*, that defendant does in this case and this Court rejected the assertion that the statement from *Claypool* pertaining to *Blakely* is not binding precedent. Pursuant to MCR 7.215(C)(2), *Drohan* is binding precedent and controls in this case. As such, we reject defendant’s argument.²

Next, defendant, in his Standard 4 brief, argues that the prosecutor engaged in misconduct by failing to impeach the victim for his false testimony and by failing to disclose the witness, Jackson, to the defense in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). We disagree. Because defense counsel did not object to the prosecutor’s alleged misconduct at trial, defendant failed to properly preserve his claim for appellate review. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Thus, we review this issue for plain error. *Carines*, *supra* at 763-764.

In cases of prosecutorial misconduct, the determination must be made whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor’s remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

We first reject defendant’s claim that the prosecutor committed misconduct by presenting the victim’s false testimony or failing to impeach the victim with his prior inconsistent

² We note that the United States Supreme subsequently applied its holding in *Blakely* to the determinate federal sentencing guidelines, *United States v Booker*, 543 US ____; 125 S Ct 738; 160 L Ed 2d 621 (2005), but we are bound to adhere to *Claypool*.

statements. The prosecution has a constitutional duty to report the false testimony of its witnesses and may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 276-278; 591 NW2d 267 (1998). However, absent proof that the prosecution knew that the trial testimony was false, there was no due process violation and reversal is unwarranted. *People v Herndon*, 246 Mich App 371, 417-418; 633 NW2d 376 (2001).

Defendant specifically argues that the prosecutor presented the false testimony of the victim, who testified at trial that he was outside the car when defendant shot him. Defendant claims that the victim was untruthful regarding where the shooting took place. To support this claim, defendant notes that, at Jackson's preliminary examination, the victim previously testified that he told the personnel at the hospital, "I was in the car with [Jackson] and when I woke up I saw the guy shoot at me." Defendant also notes that Officer Allen Jacokes testified that his police report contained the victim's statement that the victim was shot while riding in the car and then dumped at the scene. However, even assuming that the victim's testimony regarding his whereabouts at the time of the shooting differed from his previous statements to hospital personnel or Officer Jacokes, defendant has failed to demonstrate anything more than a discrepancy, which relates to credibility. See *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Defense counsel was free to impeach the victim's credibility with the prior statements and, in fact, he conducted an effective cross-examination of the victim regarding the inconsistencies in the victim's statements. There is no indication that the prosecutor was attempting to mislead the jury or conceal the inconsistencies or details of his whereabouts at the time of the shooting, nor does the record support defendant's claim that the victim gave false testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Moreover, given the fact that the victim knew defendant for all of his life and had no doubt of his identification of defendant as the shooter based on their prior relationship, it is unlikely that any discrepancy concerning whether the victim was in or outside of the car, when shot, affected the outcome of the trial. Because nothing in the record indicates that the prosecutor engaged in any misconduct, defendant has failed to demonstrate plain error. Therefore, we hold that reversal is not warranted on this basis.

We also reject defendant's argument that the prosecutor committed a *Brady* discovery violation by failing to disclose Jackson to the defense. *Brady, supra* at 83. A criminal defendant has a due process right of access to certain information possessed by the prosecution. *Lester, supra* at 281, citing *Brady, supra* at 83. "In order to establish a *Brady* violation, a defendant must prove (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Lester, supra* at 281. Similarly, in Michigan, MCR 6.201(B)(1) requires the prosecutor, upon request, to provide each defendant with certain information, including any exculpatory information or evidence known to the prosecuting attorney, any police report concerning the case and any written or recorded statements by a defendant. MCR 6.201(B); see *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997). However, criminal defendants do not otherwise possess a general constitutional right to discovery. *People v Elston*, 462 Mich 751, 765-766; 614 NW2d 595 (2000). A criminal defendant's due process right to discovery is implicated only with regard to evidence that is

favorable to the defendant, exculpatory, or known by the prosecution to be false. *People v Tracey*, 221 Mich App 321, 324-325; 561 NW2d 133 (1997).

In this case, the record reveals that Jackson was a codefendant and the charges against Jackson were dismissed at his preliminary examination. Defendant is, thus, unable to prove that he did not know of Jackson and of his involvement. Also, there is no indication that Jackson was withheld by the prosecution. Consequently, defendant is unable to establish a *Brady* violation. See *Lester*, *supra* at 281. Defendant was not denied due process; therefore, he is not entitled to a new trial on this ground.

Next, defendant argues that defense counsel was ineffective for failing to object to the prosecutorial misconduct. We disagree. Because defendant failed to move for a new trial or a *Ginther*³ hearing, this Court's review of defendant's ineffective assistance of counsel claims is limited to the mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). In reviewing a claim of ineffective assistance of counsel, a trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005), and the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578.

We conclude that defendant's ineffective assistance of counsel claim, based on his counsel's failure to object to the alleged prosecutorial misconduct, fails. As discussed above, there was no evidence establishing prosecutorial misconduct. Accordingly, defense counsel was not required to object to the alleged prosecutorial misconduct or to bring a fruitless motion for a mistrial. *People v Darden*, 230 Mich App 597, 605; 587 NW2d 27 (1998).

Finally, defendant argues that the cumulative effect of errors denied him a fair trial. This claim has no merit. To establish a case of cumulative error, defendant must show "cumulative unfair prejudice," and only actual errors may be aggregated to make this showing. *LeBlanc*, *supra* at 591-592 n 12. As discussed above, there was no plain error affecting defendant's substantial rights in the scoring of OV 12 and OV 14, there was no prosecutorial misconduct and there was no showing that defendant received ineffective assistance of counsel. Where defendant failed to show any prejudicial error, there was no accumulation of error of which to make issue. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Affirmed.

/s/ Christopher M. Murray

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly